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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD W. VELDE, et al.,

Petitioners,

—v.—

NATIONAL BLACK POLICE ASSOCIATION, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED*

1. Whether federal officials are absolutely immune from personal damages liability for alleged constitutional and statutory violations arising from their intentional refusal to carry out their civil rights enforcement obligations.

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* In their Petition for a Writ of Certiorari at p.i, petitioners request this Court to consider three questions. The first question presented by petitioners is premised on a mischaracterization of respondents' claims in this case; that question is thus restated by respondents in the text above. The second and third questions presented by petitioners, neither of which was addressed by the courts below, should not be considered by this Court for the reasons set forth at pp. 7-8 n.9, infra.

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STATEMENT

Respondents -- the National Black Police Association and twelve named individuals -- brought suit in 1975, alleging a consistent and willful refusal by petitioners to carry out their statutory and constitutional obligations to deny or withdraw federal financial assistance to grantees practicing discrimination. C.A.App. at 8-37 (Complaint, ¶¶23-112).[1] At the time this action was commenced, petitioners were federal officials[2] who managed

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1. Citations in the form "C.A.App." are to the Appendix filed with the U.S. Court of Appeals for the District of Columbia; citations to the decision below are to National Black Police Association v. Velde, 431 F.2d 784 (D.C.Cir. 1980).

2. The petitioners, and the jobs they held at the time that this action was commenced, are Richard W. Velde, Administrator of LEAA; Charles R. Work, Deputy Administrator of LEAA; Herbert C. Rice, Director of LEAA's Office of Civil Rights Compliance; and Edward H. Levi, Attorney General of the United States. Each was alleged to be "responsible for insuring that LEAA funds are not used in a racially or sexually discriminatory manner by recipients of LEAA funding and for enforcing LEAA's constitutional and statutory civil rights obligations." C.A.App. at 8-9 (Complaint, ¶¶14-17).

the Law Enforcement Assistance Administration, an agency which distributed several billion dollars' worth of federal grants.

In essence, petitioners were charged with failing to alter conditions which Congress had already found to exist: namely, that "LEAA has had no civil rights enforcement program." 119 CONG. REC. 20071 (1973).[3,4]

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3. Petitioners were charged, for example, with providing unabated LEAA funding to more than 50 law enforcement agencies judicially found to have engaged in unlawful employment discrimination, C.A.App. at 11 (Complaint, ¶23); with refusing to conduct pre-award compliance reviews of law enforcement agencies applying for LEAA funding, C.A.App. at 13 (Complaint, ¶29); with refusing to review the written Equal Employment Opportunity Programs of LEAA recipients, C.A.App. at 13 (Complaint, ¶30); with refusing to review the use of unlawful minimum height requirements maintained by LEAA recipients, C.A.App. at 13 (Complaint, ¶31); with refusing to act on administrative complaints of discrimination, C.A.App. at 14 (Complaint, ¶33); and with never having even initiated an administrative fund termination proceeding against a law enforcement agency that had been found to be in noncompliance with federal nondiscrimination requirements, C.A.App. at 14 (Complaint, ¶35).

4. This finding motivated the Congress to enact §518(c) of the Crime Control Act of 1973 which imposed mandatory civil rights enforcement obligations upon LEAA officials. See 42 U.S.C. §3766(c) (Supp. V 1970).
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Alleging that petitioners' uniform, knowing funding of discriminatory law enforcement agencies violated the Fifth Amendment,[5] §518(c) of the Crime Control Act,[6] and other federal statutes,[7] respondents sought compensatory

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LEAA's lack of civil rights enforcement, however, continued. As Congress concluded three years later: "The response of LEAA to the 1973 civil rights amendments has been less than minimal." H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 11 (1976). See also the findings on LEAA's nonenforcement rendered by the United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort, Vol. VI, To Extend Federal Financial Assistance, Introduction, 271-393, 773-777 (November, 1975), set forth in C.A.App. at 481-623.

5. Respondents' Fifth Amendment claim was based on the established principle that "the Federal Government could not under the Constitution give direct financial aid to [recipients] practicing . . . discrimination." Green v. Connally, 330 F.Supp. 1150, 1164 (D.D.C. 1971) (three-judge court), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971); see also, Norwood v. Harrison, 413 U.S. 455 (1973); see generally, n.16, infra.

6. Section 518(c) of the Crime Control Act, 42 U.S.C. §3766(c) (Supp. V 1970), as amended in 1973, imposed mandatory administrative enforcement obligations on petitioners once discrimination had been found. See n.4, supra, and n.15, infra.

7. Respondents also alleged that petitioners violated, inter alia, 42 U.S.C. §1985(3).

and punitive damages[8] for injuries suffered by them

> as a result of [petitioners'] willful and malicious refusals, which are unconstitutional and in excess of their authority as set forth above, to insure that LEAA funding is not awarded to governmental law enforcement agencies engaged in racially or sexually discriminatory employment practices, and as a result of [petitioners'] willful and malicious refusals, which are unconstitutional and in excess of their authority, to enforce their federally mandated civil rights enforcement obligations.

C.A.App. at 38-39 (Complaint, ¶E).

Without permitting any discovery, the district court dismissed respondents' damage claims on the grounds that "the challenged actions of the [petitioners] clearly fall within the outer perimeter of the line of their official duties, Barr v. Mateo [sic], 360 U.S. 564 (1959)." C.A.App. at 479 (District Court Order of Dec. 8, 1976). Subsequent to this Court's decision in Butz v. Economou, 438 U.S. 478 (1978), while this matter was pending on respondents' appeal to the U.S. Court of Appeals for the District of

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8. Respondents' request for injunctive relief, dismissed by the district court but reinstated by the court of appeals, is not at issue before this Court.

Columbia, petitioners alleged for the first time that they all were administrative prosecutors and that all of their challenged actions were protected by an absolute prosecutorial immunity. Appellee's C.A. Supplemental Brief at 1-10. A majority of the court of appeals' panel below held that petitioners were entitled only to a qualified good faith immunity. National Black Police Association v. Velde, 431 F.2d 784, 786-787 (D.C.Cir. 1980). The Petition for Rehearing and Suggestion for Rehearing En Banc filed by petitioners was denied by the en banc court of appeals August 1, 1980. See Petition at App. C, p.26a.

SUMMARY OF ARGUMENT

In Butz v. Economou, 438 U.S. 478 (1978), this Court rejected petitioners' contention that federal officials, who were alleged to have violated respondents' constitutional rights, were protected by an absolute immunity. Instead, such officials, except for those few who actually act as administrative prosecutors, are entitled only to a qualified good faith immunity.

The panel opinion below, holding that petitioners here are entitled only to a qualified

good faith immunity, is entirely in accord with this Court's decision in Butz. It also is in accord with the decisions of the courts of appeals which have uniformly held that federal and state officials engaged in administrative or investigative functions who are charged with violating constitutional rights are entitled not to an absolute immunity but to only a qualified good faith immunity. Additionally, the alleged prosecutorial discretion on which petitioners rest their submission does not exist in fact, and in any event is wholly circumscribed by the statutory mandate of §518(c) of the Crime Control Act, 42 U.S.C. §3766(c) (Supp. V 1970).

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

The Ruling Below Involves No Issues Not Resolved in Butz

Here, as in Butz v. Economou, 438 U.S. 478, 485 (1978):

> [The] submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if . . . they infringed respondent[s'] constitutional rights and even if the violation was knowing and deliberate.

Just as this submission[9] was rejected in Butz as "contrary to the course of decision in this Court from the very early days of the Republic," 438 U.S. at 487, it should be rejected here.

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9. In our view, only the first question presented in the petition is worthy of an extended response. The second and third questions, neither of which was addressed by the courts below, merit but a brief response here.

Petitioners describe the second issue in the case, in their Petition at p.i, as whether a cause of action under the Fifth Amendment exists against federal officials who are alleged to have been responsible for the continuation of federal funding to recipients which discriminate on the basis of race or sex. However, in the body of the Petition the government argues principally about the standards of proof which should be required in order to establish a violation of the Fifth Amendment. Petition at pp.17-20. Nothing can be implied from the decision of the court of appeals about the proof which that court would require in order to establish a substantive violation of respondents' constitutional or statutory rights -- except that the allowance of a "defense of good faith or reasonable grounds for their conduct," is in no way inconsistent with petitioners' insistence upon intentional discrimination. Petitioners' argument on this point also misconstrues the allegations of the complaint. The constitutional and statutory violations alleged by respondents occur when the federal government provides financial support to racial and sex-based discrimination. The complaint more than amply alleges that these violations were intentional on the part of the petitioners, who were pointedly notified of their occurrence but who thereafter refused to take action necessary to end the violations. The complaint in fact alleges that petitioners' refusals to act were "willful and malicious." C.A.App.

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In Butz, this Court held that Executive Branch officials, like their state counterparts, are entitled only to a qualified good immunity where they are charged with constitutional violations, subject to the limited

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at 38 (Complaint, ¶E). And, as the Court has said in another context, "[e]ach instance of a failure or refusal to [eliminate a constitutional violation] continues the violation." Columbus Board of Education v. Penick, 443 U.S. 449, 459 (1979).

Petitioners' third question presented is even more far-fetched in the posture of this case. Essentially petitioners argue that this lawsuit should have been dismissed because petitioners ultimately could be found only to have acted in good faith, and that they thereby should be allowed "to invoke a qualified immunity as a matter of law." Petition at p.20. Indeed, petitioners even assert that "[n]othing in respondents' complaint or the record before the district court suggests that petitioners' actions or failure to act were motivated by bad faith." Petition at p.21 n.20. To the contrary, respondents' complaint -- the allegations of which must be taken as true, Conley v. Gibson, 355 U.S. 41, 45-46 (1957) -- charges that petitioners' unconstitutional and illegal behavior was "willful and malicious." C.A.App. at 38 (Complaint, ¶E). Additionally, the record in this case, assembled by respondents despite the trial court's refusal to allow them discovery, provides considerable support for respondents' allegations that petitioners acted willfully and maliciously in violation of respondents' constitutional and statutory rights. See, e.g., nn.13 and 15, infra. See also the findings by Congress and by the U.S. Commission on Civil Rights set out in part in n.4, supra. See generally C.A.App. at 246-477.

exception that an absolute immunity nonetheless is available to those few Executive Branch officials who act as prosecutors.[10] Petitioners here seek to come within that exception by contending that their civil rights enforcement responsibilities placed them in a prosecutorial role by requiring them to decide whether to initiate fund termination proceedings when LEAA recipients were found to have engaged in race or sex discrimination. According to petitioners, even if they followed an administrative policy of never initiating fund termination proceedings, they nonetheless have an absolute immunity from suit.

1. The basic fallacy of petitioners' argument is that, unlike Butz (and despite their characterization of respondents' claims), this action was not brought by a single disgruntled individual or corporation complaining about an individual enforcement decision made by petitioners. Instead, respondents here alleged that they and the larger class they seek to

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10. Of the dozen federal officials sued in Butz, two -- the judicial officer and the prosecuting attorney -- were held entitled to absolute immunity at least so long as they actually had been performing prosecutorial, or advocacy, functions. 438 U.S. at 508-517.

represent were harmed by petitioners' long-standing and consistent refusal to carry out any of their constitutional and statutory civil rights enforcement obligations. C.A.App. at 8-37 (Complaint, ¶¶23-112).[11] As Justice White observed in his opinion for the Court in Butz, where "[e]xtensive Government operations offer opportunities for unconstitutional action on a massive scale . . . an action for damages against the responsible official[s] can be an important means of vindicating constitutional guarantees." 438 U.S. at 506. That is the case here.

2. The Court in Butz allowed absolute immunity for only two of the dozen petitioners -- the judicial officer and the prosecuting attorney -- not just because of their titles but because their discretionary functions were analogous to the "quasi-judicial"

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11. Respondents attack petitioners' nonfeasance in many areas other than their refusal to initiate fund termination proceedings. See n.3, supra.

functions of criminal prosecutors.[12] The petitioners here, in contrast, do not hold positions with prosecutorial titles; and they in fact describe themselves not as prosecutors but as administrators. See Petition at pp.6-7 n.7. Indeed, the record below establishes that petitioners did not exercise discretion

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12. Subsequent to Butz, and in reliance on the distinctions among prosecutorial functions made in Imbler v. Pachtman, 424 U.S. 409 (1976), the courts of appeals have uniformly allowed prosecutors an absolute immunity only for actions taken as advocates before the courts, and not for actions taken in their administrative or investigative roles. Mancini v. Lester, 630 F.2d 990 (3d Cir. 1980) (county prosecutor and deputy attorney general are not entitled to absolute immunity for actions taken in their administrative or investigative roles); Marrero v. Hialeah, 625 F.2d 499 (5th Cir. 1980) (state prosecutors are not protected by absolute immunity for actions taken in their administrative or investigative roles); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), cert. denied on relevant issue, 64 L.Ed.2d 214 (1980) (state prosecutors and federal law enforcement officials are not protected by absolute immunity for actions taken in their administrative or investigative roles); Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) (two former U.S. Attorneys General are not protected by absolute immunity for actions taken in their administrative roles); see also, Miller v. DeLaune, 602 F.2d 198 (9th Cir. 1979) (federal Internal Revenue Service official is not protected by absolute immunity); cf. Halperin v. Kissinger, 606 F.2d 1192 (D.C.Cir. 1979), cert. granted, 64 L.Ed.2d 807 (1980) (the President and his advisors are not protected by absolute immunity).

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in individual cases but adopted and followed an administrative policy of never initiating fund termination proceedings.[13] In other words, there were no officials within the LEAA

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Even before this Court's decision in Butz, the courts of appeals had uniformly denied absolute immunity to federal and state officials who had been acting not in their "quasi-judicial," prosecutorial roles but in their administrative or investigative roles. Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978) (state officials); Briggs v. Goodwin, 569 F.2d 10 (D.C.Cir. 1977), cert. denied, 437 U.S. 904 (1978) (federal officials); Helstoski v. Goldstein, 552 F.2d 564 (3d Cir. 1977) (federal officials); Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974) (state officials); Hampton v. Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974) (state and federal officials); cf. Zweibon v. Mitchell, 516 F.2d 594 (D.C.Cir. 1975), cert. denied, 425 U.S. 944 (1976) (federal officials).

13. This administrative policy, set forth in 28 C.F.R. §42.206(a), 37 Fed. Reg. 16671 (Aug. 18, 1972), states an agency preference for referring all matters of noncompliance to the Justice Department for possible litigation, rather than for initiating administrative fund termination proceedings.

Although this administrative policy was violative of the statutory mandate in §518(c) of the Crime Control Act, 42 U.S.C. §3766(c) (Supp. V 1970), it was not even proposed to be changed until three months after this lawsuit was filed against petitioners. See 40 Fed. Reg. 5654 (Dec. 3, 1975). Seven months later LEAA's stated preference for judicial enforcement was ended. 41 Fed. Reg. 28478 (July 12, 1976).

For a comparison of the old regulation with the new one, see C.A. Addendum: Statutes and Regulations at 67-69.

hierarchy who functioned in a manner analogous to a judicial officer or a prosecuting attorney.

3. In Butz, where the respondent had been a defendant in an administrative proceeding, the Court accorded the two prosecutorial officials an absolute immunity primarily in reliance upon the fact that "[t]he defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding." 438 U.S. at 515. "Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal," 438 U.S. at 516, an absolute immunity for the prosecutors was held appropriate. Respondents here, however, are in a very different position,[14] for they have no alternative reme-

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14. This case is thus one of the exceptions to the general expectation of Justice White's opinion for the Court in Butz that "there is not likely to be anyone willing and legally able to seek damages from the officials if they do not authorize the administrative proceeding . . . ." 438 U.S. at 515. Respondents here, of course, like the plaintiffs in Legal Aid Society of Alameda County v. Brennan, 607 F.2d 1319 (9th Cir. 1979); Committee for Full Employment v. Blumenthal, 606 F.2d 1062 (D.C.Cir. 1979); and Adams v. Richardson, 480 F.2d 1159 (D.C.Cir. 1973), have sought relief not from an isolated refusal to authorize an administrative proceeding but from an across-the-board refusal of federal officials to carry out their constitutional and statutory civil rights enforcement obligations.

dies against petitioners except a suit for injunctive relief to obtain enforcement of their constitutional and statutory rights and a suit for damages to redress the past deprivation of those rights. Cf. Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

4. Unlike the two officials in Butz who actually acted as prosecutors, neither the petitioners here nor their delegates were clothed with any prosecutorial discretion for the simple reason that their governing statute, §518(c) of the Crime Control Act, 42 U.S.C. §3766(c) (Supp. V 1970), removed any discretion with regard to the initiation of fund termination proceedings against LEAA recipients found to be engaged in discrimination.[15] Not only

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15. For LEAA officials, such as petitioners or their delegates, there was absolutely no discretion whatsoever with regard to initiating fund termination proceedings once there has been a determination of discrimination. At the time this action was commenced §518(c)(2), 42 U.S.C. §3766(c)(2) provided:

> Whenever the Administration [LEAA] determines that a State government or any unit of general local government has failed to comply with paragraph (1) of this subsection [the prohibition against discrimination] or an applica-

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does this statute mandate the initiation of fund termination proceedings in such a situation

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> ble regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 509 of this chapter [initiate the administrative proceedings]. [Emphasis added].

Thereafter, LEAA:

> is authorized concurrently with such exercise --
>
> (A) to institute an appropriate civil action;
>
> (B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or
>
> (C) to take such other action as may be provided by law.

In summary, once there was a determination of discrimination, petitioners or their delegates were required to initiate fund termination proceedings by requesting the appropriate chief executive to secure compliance. Concurrent with but not before that step, the federal officials were authorized to refer the matter to the Justice Department for the initiation of litigation.

The mandatory nature of this statutory enforcement procedure, distinguishable from the less mandatory directive of Title VI, was hardly an accident. It was

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but this statutory obligation also is inextricably intertwined with petitioners' constitutional obligation not to provide monetary or

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specifically added to §518(c) by the Crime Control Act of 1973, 87 Stat. 214, to make the administrative fund termination proceeding the primary and automatic procedure for civil rights noncompliance rather than allowing LEAA officials to await the outcome of protracted litigation. Representative Barbara Jordan, author of the 1973 amendment, made this abundantly clear:

> The effect of my amendment . . . is to require LEAA to first use the same enforcement procedure which applies to any other violation of LEAA regulations or statutes. That procedure of notification hearings and negotiations is spelled out in section 509, which provides the ultimate sanction of funding cutoff if compliance is not obtained.
>
> This amendment was necessary to reverse LEAA's tradition reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements.

119 CONG. REC. 20071 (1973) (emphasis added).

In view of the statutory mandate, once there had been a determination of noncompliance, there was no discretion, much less any broad prosecutorial discretion, invested in petitioners or their delegates to do other than to initiate the fund termination proceedings. As noted earlier, however, see n.13, supra, petitioners instead maintained a contradictory administrative policy barring the initiation of fund termination proceedings.

other forms of assistance to discriminatory recipients.[16]

In summary, the panel decision below, allowing petitioners a qualified good faith immunity, is fully in accord with this Court's decision in Butz v. Economou, 438 U.S. 478 (1978). The narrow exception recognized in Butz for administrative prosecutors actually engaged in prosecutorial functions is not available to petitioners here, who have been charged with a uniform, willful refusal to carry out their constitutional and statutory civil rights enforcement obligations.

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16. Compare, e.g., Adams v. Richardson, 480 F.2d 1159 (D.C.Cir. 1973) (Title VI), with, e.g., Norwood v. Harrison, 413 U.S. 455 (1973) (Fourteenth Amendment), and Green v. Connally, 330 F.Supp. 1150 (D.D.C.), aff'd sub nom., Coit v. Green, 404 U.S. 997 (1971) (Fifth Amendment). See also NAACP Western Region v. Brennan, 360 F.Supp. 1006, 1012 (D.D.C. 1973) (Title VI and the Fifth Amendment), where the court observed that "both Title VI and the Fifth Amendment impose upon Federal officials not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police the operations of and prevent such discrimination by State or local agencies funded by them." Cf. Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (Title VI and the Fourteenth Amendment).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
March, 1981

Respectfully submitted,

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